Nos. 14208-14218

United States Court of Appeals

For the Ninth Circuit

WARREN E. TALCOTT, JR.,
Appellant,

vs.

COMMANDING OFFICER, et al,
Appellees.

Appellant's Opening Brief

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JURISDICTION

These consolidated appeals are from judgments of the District Court of the United States in and for the Southern District of California, Central Division. Appeal No. 14208 is from an order made on September 24, 1953 by the Honorable Dave W. Ling, United States District Judge [R. 23] denying a writ of habeas corpus. Appeal No. 14218 is from an order made on October 29, 1953 by the Honorable Harry C. Westover, United States District Judge [R. 109] denying a writ of habeas corpus.

The District Court had jurisdiction by virtue of Title 28, U.S.C., §451, to receive the petitions filed by the petitioner, seeking his release from the respondents Secretary of the Army and Commanding Officer.

This Court has jurisdiction to review, on appeal, the final orders of the District Court by virtue of Title 28, U.S.C., §463.

STATEMENT OF CASE

Appellant filed a petition for a writ of habeas corpus August 21, 1953 [R. 3]. An order to show cause was issued [R. 14]. At the time of hearing, September 1, 1953, it was stipulated that the petition was to be considered as a traverse of the return and that the matter was to be heard as if a writ had been issued [R. 29]. The petition alleged in substance that the Selective Service System order to report for and submit to induction was illegal because:

> It was based on a classification of petitioner that was made when registrant was over 26 years of age. Additionally, because
>
> It was based on a selective service processing that had denied him a personal appearance before the local board, that had included an improper failure to reopen his classification; that the classification was made at an illegal meeting and that the order to report for induction was not executed as required.

The undisputed evidence showed the following: that petitioner throughout the four years of his selective service history, was classified only twice by his local board: IV-F and I-A; that petitioner was orig-

inally classified January 27, 1950, in Class IV-F (physically unfit) and that this classification resulted in an administrative extension of his liability beyond age 26 so that his subsequent classification on October 7, 1952 in Class 1-A (liable for immediate duty), although made after his 26th birthday, was under color of law.

The evidence showed that when petitioner filed his Classification Questionnaire on April 27, 1949 he answered the questions in Series XV—Physical Condition, as follows [Ex. p. 10]*

> "1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces?
> Yes [ ] No [X]
> "2. If the answer to Question 1 is "yes", state the condition from which you are suffering. I was discharged from Naval Reserve Training Corp. because of a punctured eardrum—Later examination show no such condition."

He was asked to state what he believed his classification should be and he made *no* statement in the blank space provided. He was then informed:

> "The registrant may write in the space below or attached to this page any statement which he believes should be brought to the attention of the local board in determining his classification. As

*The selective service file (in photocopy form) is before the court as the Exhibit. It was pagenated, for trial use, at the bottom of each sheet by a one-quarter inch high number in a circle.

stated in Series XV, I feel that the condition of my eardrum should be clearly established." [Ex. p. 10].

The evidence [a letter sent by the chairman of the local board to the State Director of Selective Service] further showed:

"On January 23, 1950 he was classified IV-F without a physical examination. Upon review of the files in 1952 his liability was extended to age 35. During the ensuing IV-F review he was ordered for a physical examination and found acceptable, after having passed his 26th birth date." [Ex. p. 63].

The letter closed:

"His mother called this office requesting the address of State Headquarters, stating that his attorney had advised him that his liability has been extended in error, due to the fact that at no time prior to his 26th birth date, did he claim deferment, and also his request that his physical condition be verified was not fulfilled until after his 26th birth date.

"After careful review of this evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error.

"Therefore, we are requesting a review of his questionnaire and the letter of October 14, 1952 submitted by the registrant in support of his appeal. If your determination is that this liability

was extended in error, we request permission to re-open and reclassify into Class V-A, as it is our considered opinion that this evidence was not properly evaluated at the time of his original classification nor upon the extension of his liability." [Ex. p. 64].

The evidence also showed that petitioner had written his local [Santa Monica] board on October 14, 1952 from New York City. This was within 10 days from the Notice of Classification of I-A. The Notice of Classification (SSS Form No. 110) informs the registrant he may appeal and may have an Appearance Before Local Board. His letter of October 14, 1952 responded to this information and conformed to the Regulations §1626.2(c)(1) for appeal and §1624.1(a) for personal appearance before local board. [32 C.F.R.]. His letter indicated that petitioner desired the two avenues for relief: "I wish this to serve as my notice of appeal from my classification into I-A. Since my appeal is based on circumstances extending over the last 5 years, I would have preferred to appear before you to relate the circumstance more fully. However, the distance and expense present difficulties. However, after reviewing this appeal, I will be glad to appear in person." (underscoring supplied). [Ex. p. 25].

The evidence showed that the local board, although it reviewed the file on October 22, 1952, immediately thereafter sent the file to the Appeal Board *without giving petitioner the requested opportunity for a per-*

sonal appearance. Petitioner has never had an Appearance Before Local Board [Ex. p. 10, Minute Entries].

The evidence also showed that petitioner was classified 1-A on October 7, 1952 [Ex. p. 10] which was after he had reached his 26th birthday [Ex. p. 9].

The evidence also showed that the petitioner supplied the local board with the standard evidence that he was a father [Ex. pp. 31, 32, 33].

When Judge Ling denied petitioner a writ, a "successive" petition was filed wherein all but one of the former grounds were set forth (one being abandoned) and a new ground was additionally presented [R. 87]. This new ground came to petitioner's knowledge, as follows:

When Judge Ling's decision became known the two board members made themselves available to the petitioner and disclosed to him that they were prepared to testify:

> "That when the board classified him in Class IV-F which extended his liability, that was the effect of when they did that, they did it without looking in the file, without considering the evidence. It was a rubber stamp affair." [R. 125].

A formal offer of proof was made before Judge Westover, as follows:

> "If the chairman of the local board, a man who has been on the local board since 1940, Roger S.

Marshall, and if the other then active member of the local board, attorney Marshall Hickson, were called to the stand, they would testify as follows: That they never gave individual attention to petitioner's file in 1949 and 1950; that neither of them ever saw his file when the January 23, 1950, 4-F classification was made; that the facts concerning his physical condition and history as is shown on page 10 of the exhibit in this case, were never seen or considered by them or any of them until after he became 26 years old.

"That the classification of January 23, 1950, was considered by these two board members, the only active members at the time, a clerical procedure.

"That they know this is so because 'when the board came into it, we initialed it. This one of January 23, 1950 we didn't initial because we didn't see the file.' " [R. 143].

The court ruled that the evidence was immaterial, that all other issues presented in the Petition had been decided against petitioner by Judge Ling and the court denied a writ [R. 109].

QUESTIONS PRESENTED AND HOW RAISED

I.

During the hearing on the second Petition the appellant attempted to show that the local board never gave any consideration whatsoever to the facts in his file when the IV-F classification was entered in its records; that the board members never even saw the file at that time; that the classification entry of IV-F was made by the clerk and was her idea; that the board members were so prepared to testify; they were willing to come forward to so testify because they were distressed over appellant's plight and the failure of the court to grant him a writ on his first petition.

Appellant's position during the hearing on his second petition was that this point was a new one, not known to him until after the decision on the first petition.

The court believed he should have known of it. Appellant, by his counsel, stated he did not, could not, and that even if it had been available and/or raised in the first hearing (which it was not) he could again ask for consideration of it. The court decided the evidence was immaterial.

Therefore, the question presented here is whether a classification that results in an extension of liability can be attacked on the basis that it was itself illegally made.

II.

The undisputed evidence at the hearing on both petitions is that the evidence in the file on the subject of the IV-F classification is found on page 10 of the exhibit. Here, the registrant states he has no physical defect; that the navy once considered he had a punctured eardrum but that subsequent examination showed this to be untrue; he made no claim for a IV-F classification; he asked that the facts be looked into.

This point was argued at the first hearing; it was presented to the court, by the pleadings, in the second hearing. The court, during the second hearing, announced that all points in the pleadings had been considered.

The question presented is whether this evidence supports a determination that a basis-in-fact existed for a IV-F classification.

III.

The file shows that within the 10 day period after appellant received the I-A Notice of Classification he wrote that he desired an appeal and an Appearance Before Local Board if the board did not give him relief after it reviewed his file.

The board reviewed his file but neither gave him relief nor did it invite him to appear before it as he requested; it sent the file on to the appeal board.

The question here presented is whether he was entitled to an appearance before his local board and was he deprived of due process when he didn't get it.

IV.

The file shows that he sent the "standard" evidence of his wife's pregnancy to the board. It arrived a few days after the board had mailed him the Order to Report for Induction. In his letter of transmittal he explained he had not sent the pregnancy evidence as soon as he learned of his wife's condition because he had believed a 21 day period was required from final classification to an induction order.

The question presented is whether appellant's tardiness is excusable and, if not, is the regulation making an Order to Report a deadline, as applied to him, consistent with the intent of Congress.

SPECIFICATION OF ERRORS

Appellant's Statement of Points is on pages 116-117 and 145-146 of the Record, and is as follows:

In case number 14208

I.

The Court erred in denying petitioner a writ of habeas corpus.

II.

The Court erred in not making Findings of Fact and Conclusions of Law.

III.

The Court erred in deciding that petitioner had raised [53] no question of fact and of law undecided by Judge Ling in case number 15813.

IV.

The Court erred in rejecting, as immaterial evidence proffered by petitioner that he had discovered, after the decision of Judge Ling certain facts concerning his selective service processing and that all the local board members were prepared and ready to testify concerning them, namely: that they had never considered the evidence in his file when he was classified, that they had never even seen his file until after he was classified and that his classification was solely a "clerical" procedure.

In case number 14218

I.

The Court erred in denying petitioner a writ of habeas corpus.

II.

The Court erred in concluding that there were bases in fact for the classifications of IV-F and I-A.

III.

The Court erred in not concluding that appellant was arbitrarily and illegally deprived of a "father's" and other deferred classifications and also illegally deprived of administrative appeals for said classifications.

IV.

The Court erred in not concluding that there had been a "reopening" of the classification and that appellant had been illegally frustrated from securing a personal appearance hearing before the local board with the consequent right to an administrative appeal.

V.

The Court erred in not concluding that the classification action was invalid in that the record of the purported action is fatally insufficient to support a conclusion that there had been compliance with the legal requirements.

SUMMARY OF ARGUMENT

A writ must issue to an inductee when his induction was based on an invalid order to report for and submit to induction.

An order to report is invalid when:

1. It is based on a 1-A classification made after the registrant passes his 26th birthday and his liability for military service has not been properly extended; an unsought deferred classification of IV-F cannot extend liability especially when it was made solely by a clerk and more especially when there is no provision for appellate relief from such action. Put in other words the IV-F classification was made without any consideration whatsoever of the evidence by the constituted classifying authority and cannot be a basis for I-A classification made after the jurisdictional age of the registrant is passed.
2. The IV-F classification was arbitrary and contrary to the evidence then, or thereafter, before the board. For this additional reason it cannot be a basis for a I-A classification made after the registrant passes his 26th birthdate. In short

the rule used by the Supreme Court in the *Dickinson* case requires that a writ issue.

3. The subsequent selective service processing of appellant denied him due process of law when he was not given a personal appearance before the local board although a timely, written request was made. This is a denial of a substantial right and appellant was prejudiced thereby.
4. The subsequent selective service processing of appellant further denied him due process of law when his classification was not "reopened" after he had presented the standard evidence he was a father and therefore mandatorily entitled to a III-A Classification.

ARGUMENT

I.

A CLASSIFICATION BY A LOCAL BOARD IS INVALID WHEN NO CONSIDERATION HAS BEEN GIVEN TO THE EVIDENCE IN A REGISTRANT'S SELECTIVE SERVICE FILE.

This point does not encompass the question of whether there was a basis in fact for the IV-F classification. That question will be argued later in point II.

This point is concerned solely with whether the local board considered the claims and allegations of petitioner before classifying him. It is a point of first impression in selective service cases.

Ordinarily the presumption of official regularity disposes of any claim that a classification was merely a clerical act and not an exercise of judgment by the board.

In this case, however, the petitioner became armed with overwhelming evidence to rebut the presumption and to sustain his burden of proof.

As is seen from the selective service file the local board was early [before his induction] won over to the registrant's viewpoint and so expressed itself [Ex. pp. 63-64].

As is seen from the Transcript of Record the local board more strongly and actively endorsed his viewpoint after petitioner initially failed to secure a writ of habeas corpus; at this juncture he acquired the two board members as witnesses to establish the "new" point presented in his second petition for a writ [R. 124]. These two witnesses were the only board members in office January 23, 1950 when he was initially classified. They were still on the board and they came forward to help him in court after he failed to secure a writ on his first attempt. They were prepared to testify that his classification, because of conditions then prevailing, [pre Korea: no calls for selectees] was simply a clerical procedure and that they never saw the file before he was "classified". [R. 143].

Appellant claims this evidence was material on the following chain of reasoning:

A. Classifications must be based on a consideration of the claims and allegations before the local board; a classification made by a clerk, or by a board without considerations of the facts, is invalid;

B. The classification of January 23, 1950, classifying appellant in deferred Class IV-F was made without consideration of the facts.

C. The deferred classification of IV-F of January 23, 1950 was therefore invalid.

D. Extension of liability for service beyond the age of 26 could be made only on the basis of a *valid* prior deferred classification. Extension of appellant's liability for service was not valid, hence the Selective Service System lost jurisdiction to reclassify appellant I-A after he became age 26.

E. Reclassification of appellant as I-A was made after his 26th birthday.

F. Reclassification of appellant as I-A was not valid, nor was an order to report based on such classification.

Therefore, if appellant had been permitted to present his proffered evidence the court would have been required to grant him a writ.

A. A Classification Must Be Based on a Consideration of the Claims and Allegations Before the Local Board: A Classification Made by a Clerk, or by a Board Without Consideration of the Facts, Is Invalid.

Two vital matters are discussed in this sub-point:

1. All through the selective service regulations [32 C.F.R.] we find a regard expressed for the elementary requirement of due process that concerns us here, namely, that evidence presented must *be considered*.

In §1622.1, entitled General Principles of Classification we find, in subsection (c):

> "The local board will receive *and consider* all information pertinent to the classification of a registrant, presented to it." (emphasis added.)

In §1624.2, entitled Appearance Before Local Board we find the principle repeated, in its subsection (c):

> "(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall *consider* the new information which it receives and, . . ." (emphasis added.)

2. It is also clear from the regulations that *the board itself* classifies and that this most important function is not to be delegated to, or usurped by, a clerk. In §1622.1 (c) we find:

"(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed."

Section 1604.52, entitled Organization and Meeting, reads as follows:

"Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or classification, the board shall postpone action on the question or classification until it can be decided by a majority vote. If any member is absent so long as to hamper the work of the local board, the chairman of the local board shall recommend to the State Director of Selective Service that such member be removed and a new member appointed."

Cf. *United States v. Sage,* 118 F. Supp. 33, where the court takes cognizance of the fact that the following defect had to be cured:

". . . an unauthorized person had seconded a motion made in connection with defendant's classification by the local board." [34]

Although the matters involved, hereinabove, in subpoint A, are points of first impression it should need no further argument that classifying must be done *by*

the board and that the evidence in the file *must be considered* before classification. Also see *U. S. ex rel Accardi v. Shaughnessy,* 74 S. Ct. 499, 503-504: "Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations."

B. The Deferred Classification of January 7, 1950, Classifying Appellant in Class IV-F Was Made Without Consideration by the Board of the Facts and Was Made Solely by a Clerk.

This was the subject matter of the proffer of evidence made during the "second trial," before Judge Westover [R. 143].

C. The Deferred Classification of IV-F of January 23, 1950 Was Invalid.

This follows necessarily from sub-points A and B. The only objection which might be made is that appellant failed to appeal and, hence, failed to exhaust his administrative remedies. This is not true however, since no appeal was permitted.

A registrant's appellate rights under the selective service regulations differ somewhat from those of a litigant in a court of law. The regulations do not provide for appeals from "final orders", nor is there anywhere such a term as "appealable order", or any equivalent expression. Appeals permitted to selective service registrants are governed by the regulations, Part 1626—Appeal to Appeal Board [32 C.F.R. §1626.1 *et seq.*].

Section 1626.2 is entitled Appeal by Registrant and Others, and reads:

> "(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition."

The purpose of such a provision is clear because of the necessarily inexact state of medical opinion.

In short, appeals in the selective service system are permitted *only from classifications* and, by special proviso, a Class IV-F classification is singled out as the one classification from which no appeal may be taken.

D. Extension of Liability for Service Beyond the Age of 26 Could Be Made Only on the Basis of a Prior Valid Deferred Classification. Extension of Petitioner's Liability for Service Was Not Valid, Hence, the Selective Service System Lost Jurisdiction to Reclassify Him in Class I-A After He Became Age Twenty-six.

As we learn from pages 63-64 of the Exhibit, and also see from the Minutes of Action entry on page 10 of the Exhibit the IV-F classification resulted in the Selective Service System taking the position that ap-

pellant's liability for military service was extended beyond his 26th birth date and to age thirty-five.

On October 30, 1951 General Lewis B. Hershey, Director of Selective Service sent all local boards an interpretation denominated Local Board Memorandum No. 38, and entitled: Subject: Extended Liability to Age 35 of Deferred Registrants. Therein, the General pointed out that Section 6(h) of the Universal Military Training and Service Act provided for such an extension of liability for 10 types of classifications, and he included Class IV-F in his listing.

Appellant does not contend that Class IV-F should not have been included in such listing. Appellant only contends that *classifying him in Class IV-F illegally* [by the clerk and without consideration of the facts] makes his extension of liability for service invalid.

As a further aid to the court, appellant presents the following portions of the Act (Public Law 51, 82nd Cong., approved June 19, 1951):

In Section 4(a) Training and Service in General, we find:

> "No person, without his consent, shall be inducted for training and service in the Armed Forces or for training in the National Security Training Corps under this title, except as otherwise provided herein, after he has attained the twenty-sixth anniversary of the day of his birth."

In Section 6(h), a section that includes the subject "Extension of Age of Liability," we find:

"*Provided further,* That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces or for training in the National Security Training Corps under the provisions of section 4(a) of this Act until the Thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons *if otherwise deferable* under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe for the deferment from training and service in the Armed Forces or from training in the National Security Corps (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons *found to be* physically, mentally, or morally deficient or defective.
. . . No deferment from such training and service in the Armed Forces or training in the National Security Training Corps shall be made in the case of any individual *except upon the basis of the status* of such individual." (emphasis added.)

Granted that the court is satisfied that appellant never claimed the IV-F classification, that it was imposed on him by the clerk, that the board never considered the evidence (so that no doctrine of acquiescence or ratification of the clerk's action enters) and that no appeal was permitted it follows from a considera-

tion of the Act that the extension of his liability beyond age 26 was on an infirm basis.

E. Reclassification of Appellant in Class I-A Was Made After His 26th Birthday.

The undisputed facts are that appellant reached his 26th birthday on October 2, 1952 and that he was reclassified in Class I-A on October 7, 1952. See page 9 of the Exhibit for his birthdate and see page 10 of the Exhibit for the date of reclassification.

F. Reclassification of Appellant in Class I-A Under the Circumstances Was Not Valid, Nor Was an Order to Report Based on Such Reclassification.

There can be no dispute that the selective service system has no jurisdiction over registrants who reach their 26th birthday before an order to report for induction has been issued, unless the registrant's liability has been legally extended by virtue of the fact he has been in a deferred classification.

It is appellant's position that an illegally made classification, one that classifies a registrant into a deferred classification and one from which he had no appeal is void; that extension of liability on the basis of such classification is likewise void; that without a valid extension of liability a reclassification made past the age of 26 is likewise void; that an order to report based on a void classification is a nullity.

Although the decisions are now legion that an illegal classification deprives the board of jurisdiction to is-

sue a valid order to report for induction, none arose, until recently on the point that an Order to Report, issued after the registrant became 26, was invalid. *United States v. Shaw,* 118 F. Supp. 849, squarely points this out.

Appellant submits that the evidence proffered by him was material and that it, by reason of its source is persuasive and commands the issuance of a writ.

II.

THE IV-F CLASSIFICATION WAS ARBITRARY AND CONTRARY TO THE EVIDENCE THEN, OR AT ANY TIME, BEFORE THE BOARD. FOR THIS ADDITIONAL REASON IT CANNOT BE A BASIS FOR AN EXTENSION OF LIABILITY AND FOR A I-A CLASSIFICATION THAT IS MADE AFTER THE REGISTRANT PASSES HIS 26th BIRTH DATE.

No further argument is needed on the point that the IV-F classification was the cause of appellant's difficulties in that it, in extending his liability, gave color of law to the I-A classification made after his 26th birth date.

Therefore, if the court is satisfied that the IV-F was illegal, either because the evidence was not considered by the board (and/or was made solely by the clerk) as we argued in Point I, or because the classification had no basis in fact, as we now will argue, the conclusion is inevitable that *the action of classifying*

appellant in Class I-A was a nullity after the board lost jurisdiction to classify because its registrant had passed his 26th birth date.

No purpose would be served by citing the very numerous decisions, of all courts, holding that there must be a basis in fact for every classification. This is true in all instances, other than where a I-A classification is given. A board may give a registrant a I-A classification without any evidence in the file, after registration, because the law makes all registrants presumptively liable for I-A. But when the file contains evidence tending to support a claim for any other classification the board must have a basis in fact for the I-A. See *Dickinson,* 74 S. Ct. 153 and a host of others. Conversely, (and this is our present situation) when a file contains *evidence* that indicates a deferred classification *is not* claimed a deferred classification is improper if without basis in fact. Deferred classifications were not intended either to defer final consideration or to extend liability.

It is unfair as well as illegal to label a registrant a IV-F just because a IV-F classification can be reconsidered at all times. It is equally unfair as well as equally illegal to label a registrant IV-F for the purpose of extending his liability, when done regardless of the facts. We are not arguing that the latter is why the IV-F was given but it certainly can be said, in all fairness, that the former reason is probably the correct one. In any event the reason is immaterial.

The bald fact is that appellant, by reason of the ill-considered action of the clerk did have his liability extended. If, as we now charge, the action was ill-considered [without basis in fact] then it becomes immaterial who classified him or why.

An inspection of the evidence in the file can lead to only one conclusion, and that is the one reached by the local board *itself* when it, for the first time, took a straight look at the file:

> ". . . his attorney had advised him that his liability has been extended in error, due to the fact that at no time prior to his 26th birth date, did he claim deferment, and also his request that his physical condition be verified was not fulfilled until after his 26th birth date.
>
> "After careful review of this evidence, this Local Board feels that this might well be the case, and would hesitate to enforce an order for induction, in error." [Ex. p. 64].

The chief item in the file on this point is that appellant never claimed a IV-F, directly or indirectly.

The selective service form (Classification Questionnaire, SSS Form No. 100) provides for the assertion of a classification claim by the registrant. It specifically informs him [Ex. p. 10] that "The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, . . ."

The regulations specifically provide:

> "The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest

> address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." (underscoring supplied) [32 C.F.R. §1622.1 (c)].
>
> "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class." [32 C.F.R. §1622.10].

It needs no argument that the requirement "to the satisfaction of the local board" does not give the local board jurisdiction to classify by whim, or without basis in fact.

What were the facts presented? They are all found on page 10 of the Exhibit (originally page 7 of SSS Form No. 100). In addition to the fact that appellant did not claim a IV-F classification it is important to observe that he said NO to the question: Do you have any physical or mental condition, which, in your opinion, will disqualify you from service in the Armed Forces? Also, it is to his credit that he submitted the whole truth, although not explicitly ordered, and revealed the circumstances of his separation from the naval forces, the alleged punctured eardrum. He specifically and flatly asserted, immediately after this disclosure, that "Later examination showed no such

condition." All his other statements and answers are consistent with the assertion and the fact of his perfect health and with the fact that no claim for a deferment was being asserted.

From the standpoint of his health and fitness, the more legal and sensible thing for the classifying clerk to have done was to have classified appellant in class I-A, assuming she was justified in neither having the board classify him or having his physical condition checked. It is a fact, and common knowledge, that no registrants were being inducted in January 1950, nor until after Korea. Class I-A was not only the legally correct classification but was then, very much a true "tentative" classification, in fact, even today is the only true tentative classification. All others must be based on specific facts, whereas I-A is permissible in the absence of any facts, after initial jurisdiction is acquired.

Although the purpose of the Selective Service System is to raise an army the System is required to obey the law and its own regulations and must classify accordingly.

To paraphrase *Dickinson v. United States, supra:* The courts may properly insist that there be some proof to support the classification [157]; when the uncontroverted evidence places him *prima facie* in a classification, suspicion or speculation may not be used as a basis to place him in another [158]. The dissenting opinion emphasizes the duty of the board:

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record." [159].

Appellant submits that the local board was required to "build a record" as the appellant himself suggested on page 10 of the Exhibit. Since no such record was built [it is safe to say none could have been built] there is no basis in fact here that meets the standard required by *Dickinson.*

III.

THE LOCAL BOARD FRUSTRATED PETITIONER FROM SECURING AN IMPORTANT PROCEDURAL RIGHT, NAMELY, A PERSONAL APPEARANCE BEFORE THE LOCAL BOARD (WITH THE COROLLARY RIGHT TO AN APPEAL THEREAFTER SHOULD THE DECISION BE ADVERSE) ALTHOUGH HE HAD MADE A TIMELY, WRITTEN REQUEST. THIS WAS A DENIAL OF DUE PROCESS.

It is too well established to require argument that the deprivation of a procedural right as important as a personal appearance before the local board, after a timely, written request is a denial of due process and invalidates subsequent action. *Knox v. United States,* 200 F. 2d 398, although not directly in point is a decision of this court on a closely related deprivation.

The controlling fact is that on October 14, 1952 appellant complained of the I-A reclassification given him seven days earlier. His letter should be read by the court for it states his case more eloquently than counsel can [Ex. pp. 25-28]. Its excellent chirography makes it easy reading, in contrast to the letters generally found in selective service files.

Pertinent to the point presently being argued the letter requests an appeal and a personal appearance hearing, both avenues of relief being open to him under the regulations, as will be hereafter shown. The opening paragraph of the letter was direct and clear:

> "I wish this to serve as my notice of appeal from my classification into I-A. Since my appeal is based on circumstances extending over the last 5 years, I would have preferred to appear before you to relate the circumstances more fully. However, the distance and expense present difficulties. However, after reviewing this appeal, I will be glad to appear in person." (underscoring supplied). [Ex. p. 25].

The evidence showed that the local board, although it did (as requested) review the file on October 22, 1952, immediately thereafter sent the file to the Appeal Board *without giving petitioner the requested opportunity for a personal appearance.* Petitioner has never had an Appearance Before Local Board [Ex. p. 11, Minute Entries]. Petitioner's clear desire was for an opportunity to appear before the board if the more

economical letter (he was 3,000 miles away) didn't convince them.

The court has doubtless frequently observed, and should take judicial notice of the following selective service practice: A communication comes into the office and the clerical procedure is to red-pencil certain phrases and/or to make red-pencil marginal notes to indicate how the communication is to be filed, answered, and otherwise handled. Invariably a letter requesting an appeal has the word or expression of appeal underlined. Frequently, a letter containing one or more *additional* requests does not have the "unimportant" [this is obviously the clerk's decision] parts underlined. Thus, the requests of "lesser importance" may be lost in the shuffle, as here. Note [see pp. 25-28 of the exhibit] that as a result of his October 14th letter he received the "requests" that are underlined, namely, an appeal and an investigation of both his IV-F situation and of his "dependency" situation:

1. His file was sent to the Appeal Board [Ex. p. 10];
2. The dependency situation was given an investigation [Ex. pp. 57-62];
3. The board itself, for the first time "saw" the IV-F situation and was won to his side [Ex. pp. 63-64].

But his unmistakable desire for an opportunity to "relate the circumstances more fully" was ignored. Why? Clearly because the clerk never gave the board

a chance to set a date. Although there is no *direct* evidence on this the circumstantial evidence should make this conclusion acceptable and make any other unacceptable.

The regulations give the registrant the right, at an appearance before local board to

1. "discuss his classification;"
2. "point out the class or classes in which he thinks he should have been placed;"
3. "direct attention to any information in his file which he believes the local board has overlooked;"
4. "present such further information . . ."

The full regulation, in the version in effect all during 1952, is found in Appendix 1.

In conclusion, it is submitted that the deprivations appellant suffered when the board, after reviewing the file on October 22, 1952 [Ex. p. 10] immediately sent the file to the Appeal Board, are obvious from the above and more so when we see, by subsection (e) of §1624.2 that he was deprived of an appeal based on a file that included what would have transpired at the Appearance Before Local Board.

IV.

THE LOCAL BOARD FAILED TO REOPEN APPELLANT'S CLASSIFICATION, AND CLASSIFY HIM ANEW, WHEN HE PRESENTED THE STANDARD EVIDENCE SHOWING THAT HE WAS A FATHER, AND THEREFORE MANDATORILY ENTITLED TO A III-A CLASSIFICATION. THIS WAS A DENIAL OF DUE PROCESS.

Nearly all selective service deferred classifications require the exercise of some degree of judgment by the local board. There is always some question concerning a registrant's conscientious objections to war, or whether his evidence meets the various occupational standards imposed, or whether his claim for a "hardship III-A" classification meets the "extreme hardship" test. However, the "father's III-A" classification, according to the standard imposed at all times applicable to this appellant, was mandatorily required once the standard evidence was submitted, absent a question of forgery. The standard evidence is filing "with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based." [1622.30 (2) (a)].

Appellant submitted the required evidence [Ex. pp. 31-33]. It was sent as soon as appellant received the Order to Report for Induction [Ex. p. 30]. Appellant's covering letter [Ex. p. 31] explains why the evidence

had not been sent before. If the board had received this "mandatory" evidence *before* it issued the Order to Report for Induction it doubtless would never have issued the Order but would have reclassified Appellant in Class III-A. See page 35 of the Exhibit which is a request for postponement of induction by the chief clerk of the board (Group Coordinator for all the boards officed with appellant's board); it is based on the "extreme hardship" feature of his evidence, not on the "fatherhood" feature, unquestionably because of the regulation's proviso that the evidence of fatherhood must be filed "prior to the time the local board mails him an Order to Report for Induction which is not subsequently cancelled for a reason not related to the filing of the certificate hereinafter mentioned. . . ." [§1622.30 (a)].

The Order to Report *was* "postponed" [Ex. p. 39] as soon as the Chief Clerk's (Group Coordinator's) request was received but this action may not meet the definition of "cancellation"; nevertheless, the postponement was "for a reason not related to the filing of the certificate." Cf. *United States v. Parker,* 200 F. 2d 540, 541.

Appellant submits, additionally, that the proviso in the last quoted regulation, as construed and applied to him, is contrary to the Act.

Although the board (and doubtless the clerk too) came to have a sympathetic attitude towards appellant, its construction of this regulation was too literal.

This harshly bureaucratic construction is in sharp contrast to the board's prior construction of the regulations and thus deserves passing attention in a consideration of this topic:

1. In 1950, when appellant was classified, and in 1951 (until 28 September 1951) the regulation pertaining to the III-A deferred "dependency" classification read as follows:

> "CLASS III-A: REGISTRANTS WITH DEPENDENTS.—(a)
> "In Class III-A shall be placed (1) a registrant who has a wife or child with whom he maintains a bona fide family relationship in their home; or (2) a registrant whose induction into the armed forces would result in hardship and privation to a person dependent upon him for support." [§1622.15].

It is beyond dispute that during this period, the fact of being a husband in a bona fide family relationship was alone sufficient to make mandatory the III-A Classification, although local boards, following directives from the National Director and State Directors did not think so. See *Ex parte Barrial,* 101 F. Supp. 348.

Although it is indisputable [see page 16 of Exhibit] that the board had evidence that appellant was married during this period it did not then or ever place him in Class III-A.

2. In 1950, 1951 and up to the present, the regulation [§1622.25] pertaining to the II-S deferred "student" classification has been substantially the same. It is comparatively long (114 printed lines) and need not be set forth inasmuch as there probably will be no dispute but that appellant qualified as a full time student. However, he was never given a II-S classification although the board at all times (see p. 5 in Exhibit) knew this.

3. On 28 September 1951 the regulation with respect to the III-A family hardship deferred classification was changed from requiring the status of a husband to requiring the status of a father. "Father" was defined as starting with conception.

Suffice it to say that the local board never changed the classification of appellant, at any time, until after he was 26 years old, and then only to the I-A classification.

When a registrant presents evidence for any deferred classification, and that evidence is unrebutted, it may not be disregarded.

Dickinson v. United States, supra.

So, here we have a situation where the registrant had present in his file evidence for various deferred classifications and all of it was ignored. Then, when he presents evidence for a deferred classification on the basis of fatherhood he is blocked by a literal interpretation of the regulations.

Such a literal interpretation is contrary to the intent of Congress. Congress unquestionably intended that families be preserved and that fatherhood be rewarded with a deferment. Congress set no deadlines for the presentation of evidence. The regulation setting a deadline is an alteration of the legislative intent. It defeats the intent of Congress. True, this particular deadline makes administration easier than the natural deadline of induction. The courts however, should not favor such an artificial deadline. At least one court has so intimated:

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by Sec. 5(h) of the Act, which provides that 'No . . . exemption or deferment . . . shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status any time prior to his induction into service and therefore be entitled to a deferment." (under-

scoring supplied). *Hull v. Stalter,* 151 F. 2d 633, 635.

At least one court has squarely decided that such a proviso is contrary to the intent of Congress. In the case of *United States v. Crawford,* No. 33742, N.D. Calif. S.D., decided February 5, 1954 the court was faced with a factual and legal situation identical in principle with this appellant's. The entire decision, with its footnotes, is as follows:

"Defendant was indicted for violation of Sec. 12a, Universal Military Training and Service Act, 50 USC App. 462a, after having refused to submit to induction into the Armed Services pursuant to an order of his local draft board.

"Defendant registered with his Selective Service Board on October 13, 1948 and was classified "1-A" on August 22, 1950. Thereafter, he was repeatedly deferred, first because he was a student and later because he enlisted in a component of the Active Military Reserve. On February 19, 1952, defendant was again classified "1-A" and on June 13, 1952, he received an "Order to Report for Induction" with a concurrent postponement of induction for one year. Thereafter, on April 14, 1953, defendant for the first time claimed that he was a conscientious objector and filled out the appropriate forms soon thereafter. The Board declined to reopen defendant's classification and the events giving rise to the indictment thereupon followed.

"It is clear that exemption from military service is not a constitutional right but merely a mat-

ter of legislative grace.[1] The statute, however, expressly provides that an individual claiming conscientious objection is entitled to have the character and good faith of his objections evaluated at a hearing before the local board and, if his claim is not sustained, by appeal to an appropriate appeal board and reference of the case to the Department of Justice for additional hearing.[2] Selective Service System Regulation 16252, on the basis of which the local board declined to reopen defendant's case, provides that " . . . the classification of a registrant shall not be reopened after the local board has mailed to the registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

"It being clear that a postponement of induction does not invalidate an outstanding Order of Induction,[3] the sole legal question before the Court is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it.[4] While Regulation 16252 is not invalid on its face, it can have no applicability to a claim of conscientious objection, whenever made, so as to deprive the objector of a hearing at which he may prove his good faith.

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[1]George v. United States, 196 F. 2d 445 (9th Cir. 1952), cert. denied, 344 U. S. 843.

[2]Universal Military Training Act of 1948, sec. 6(j), 50 U. S. C. App. sec. 456(j) as amended June 19, 1951, 65 Stat. 83.

[3]Selective Service System Regulation 1632(d).

[4]See U. S. v. Clark, 105 F. Supp. 613, 615 (W. D. Penn. 1952).

"No such hearing having been afforded defendant, the United States has not met the conditions precedent to a prosecution for draft evasion.

"The defendant stands acquitted.

"So ordered.

Dated: February 5th, 1954.

s/Edward P. Murphy

UNITED STATES DISTRICT JUDGE

(ENDORSED)

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C. W. Calbreath, Clerk"

The *Clark* case, referred to in the above opinion, deals more specifically with a registrant's right to appellate consideration but the decision's construction of Congressional intent is in point:

"Although the regulations, literally construed, tend to support this position, we think that a right of appeal does exist in this case. An Act of Congress creates that right without any express limitation, and it seems unreasonable to hold that Congress intended the right of appeal to exist only where the claim for exemption as a conscientious objector was considered at the time of the initial classification. This would be the result in effect if we accept the Government's contention. The right of appeal would exist only in cases where the claim is considered at the time of the initial classification; in all other instances the local board would be able to determine whether a claimant should have an appeal merely by framing its order

as a refusal to reopen the original classification rather than an order granting a reopening of the classification on which a hearing would be held and the right of appeal from an adverse determination granted. The defendant in his testimony during the trial of this case admitted that he did not have this conviction until some time after his classification. If Congress had intended that the right of appeal from the refusal of a claim for exemption based on conscientious objections to military service should be granted only to those persons who had the conviction at the time of the registration and initial classification, it would have been a simple matter to so provide in the statute." (underscoring supplied). [615].

The Third Circuit had a similar problem of construction in *Berman v. Craig,* 207 F. 2 888

"Sections 1625.1 and 1625.2 of the Regulations[5] taken together require a local board to consider anew the classification of a registrant who reports, within 10 days after it occurs, a change in his status which may require his reclassification[6]. This it is the board's duty to do even though, as here, an order to report for induction has been sent to the registrant, provided he has not yet been inducted. Such a timely report was made to the local board in this case by Berman through his telegram of July 3, 1952, supplemented and corroborated by the letter of July 8th from the theological school. It is true that the telegram used the word 'appeal'. But this did not justify the board in regarding it as solely an appeal in the

technical sense or in wholly ignoring the changed draft status which it disclosed. Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel.[7] The local board should have given consideration to Berman's change of status and determined whether it

required his reclassification. Its failure to do so deprived him of an important procedural right to which he was entitled.[8]'' (underscoring supplied). [891).

CONCLUSION

A selective service registrant should always be able to show, if he has evidence available, that the local board members never gave his file any consideration whatsoever when classifying him, especially when that classification, as is true here, resulted in an extension of his liability for service beyond age twenty-six.

Every classification, other than a I-A must be based on facts in the registrant's file. There were none for the IV-F classification that extended his liability.

The failure to give appellant a personal appearance flouted his expressed, timely, written request and was a denial of due process.

His I-A classification should have been reopened when he presented the standard fatherhood evidence so that the mandatory III-A ''father's'' classification could be given him.

By reason of the above and each of them, the judgment of the district court should be reversed and a writ should issue.

Respectfully,

J. B. TIETZ
Attorney for Appellant.

Appendix

APPENDIX ONE

PART 1624—APPEARANCE BEFORE LOCAL BOARD

1624.2 Appearance Before Local Board.—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.